Supreme Court, U.S.
FILED
JUL 18 2002
CLERK

(12)

No. 01-1231

IN THE

Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, et al.,
Petitioners,

vs.

JOHN DOE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

22 pp

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

TABLE OF CONTENTS

Question presented i

Table of authorities iv

Interest of *amicus curiae* iii

Summary of facts and case 2

Summary of argument 4

Argument 4

I

If the statute is substantively valid, there is no procedural due process question 4

II

The statute is substantively valid 7

A. The rationality standard 8

B. Identifying the purported right 9

C. Application of the standard 10

Conclusion 16

TABLE OF AUTHORITIES

Cases

Albright v. Oliver, 510 U. S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) 8

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 11

County of Sacramento v. Lewis, 523 U. S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) 7, 8, 9

Doe v. Dep't of Pub. Safety, 271 F. 3d 38 (CA2 2001) 2, 3, 9, 10

Doe v. Lee, 132 F. Supp. 2d 57 (D. Conn. 2001) 3

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983) 10

Jones v. United States, 463 U. S. 354, 77 L. Ed. 2d 694, 103 S. Ct. 3043 (1983) 14

Kansas v. Hendricks, 521 U. S. 346, 138 L. Ed. 2d 501, 117 S. Ct. 2072 (1997) 11, 14

Michael H. v. Gerald D., 491 U. S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989) 4, 6

New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U. S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978) 4, 6, 7

Paul v. Davis, 424 U. S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) 8

Reno v. Flores, 507 U. S. 292, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) 4, 5, 6, 9

State v. Timmendequas, 161 N. J. 515, 737 A. 2d 55 (1999) 10

State v. Timmendequas, 168 N. J. 20, 773 A. 2d 18 (2001) 10, 15

Washington v. Glucksberg, 521 U. S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997) 8, 9, 15

State Statutes

Conn. Gen. Stat. § 54-250 2

Conn. Gen. Stat. § 54-251 2

Conn. Gen. Stat. § 54-252 2

Conn. Gen. Stat. § 54-254 2

Treatise

R. Rotunda & J. Nowak, Treatise on Constitutional Law (3d ed. 1999) 5, 7

Miscellaneous

Becker & Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychology, Pub. Pol. & L. 116 (1998) 12, 13

Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994 (2002) 10

Center for Sex Offender Management, Recidivism of Sex Offenders (May 2001) <http://www.csom.org/pubs/recidsexof.pdf> 10, 11, 13, 14, 15

R. Holmes, Sex Crimes (1991) 10

Litwack, Actuarial Versus Clinical Assessments of Dangerousness, 7 Psych. Pub. Pol & L. 409 (2001) ... 12

Marshall, Current Status of North American Assessment and Treatment Programs for Sexual Offenders, 14 J. Interpersonal Violence 221 (1999) 12

McGrath, Sex-Offender Risk Assessment and Dispositional Planning: A Review of Empirical and Clinical Findings, 35 Int'l J. Offender Therapy & Comp. Criminology 328 (1991) 12, 13, 15

Prentky, Knight, & Lee, Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters, 65 J. of Consulting and Clinical Psych. 141 (1997) 13

Quinsey, Harris, Rice, & Lalumière, Assessing Treatment Efficacy in Outcome Studies of Sex Offenders, 8 J. Interpersonal Violence 512 (1993) 11

IN THE

Supreme Court of the United States

CONNECTICUT DEPARTMENT OF PUBLIC SAFETY, et al.,
Petitioners,

vs.

JOHN DOE, et al.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attack on the constitutionality of a state-created Web site that lists convicted sex offenders solely by virtue of their conviction. The Internet registry was created for the purpose of protecting the public and for facilitating

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

access to publicly available information. The Second Circuit's decision makes it far more difficult for the public to access this information, effectively denying parents the ability to warn children of convicted sex offenders living in their neighborhoods. This result is contrary to the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The present case arises from an objection to Connecticut's "Sex Offender Registry" Internet database, which was part of the state's version of "Megan's Law." *Doe* v. *Dep't of Public Safety*, 271 F. 3d 38, 42 (CA2 2001). Before the District Court issued an injunction, anyone with access to the Internet was able to search the database by zip code, town name, or by last name. *Id.*, at 44. The search results yielded a direct link to another page entitled "Registered Sex Offender," containing the registrant's name, address, photograph, and physical description. The first page of the Web site contained a statement that read in part:

> "The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous . . . . The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual." *Ibid.*

The persons listed in the database were individuals convicted of one of four statutorily defined categories: criminal offenses against a victim who is a minor, nonviolent sexual offenses, sexually violent offenses, and felonies committed for a sexual purpose. See Conn. Gen. Stat. §§ 54-250(2), (5), (11), (12), 54-251(a), 54-252(a), 54-254(a).

John Doe, the plaintiff in this case, alleged that he was convicted of one of the offenses designated in the statute, but has not specified the offense. See App. to Brief in Opposition 3. Doe filed suit under 42 U. S. C § 1983, alleging that Connecticut's sex offender law violated the *Ex Post Facto* Clause and his Fourteenth Amendment right to procedural due process. Doe claimed that the procedural due process violation occurred because he was not given an opportunity to avoid being listed on the Internet database. The District Court granted summary judgment to Doe on the due process claim and dismissed the *Ex Post Facto* claim. *Doe* v. *Lee*, 132 F. Supp. 2d 57, 59 (D. Conn. 2001). John Doe filed a motion for class certification of all persons who were subject to the registration and public disclosure requirements of Connecticut's sex offender act. The District Court granted the motion, as well as Doe's motion for a permanent injunction. *Doe* v. *Dep't of Public Safety*, 271 F. 3d, at 46-47.

When Connecticut appealed, Doe argued, and the Court of Appeals agreed, that his reputation, combined with the alteration of his status under state law, constituted a protected liberty interest deserving of procedural due process protection. 271 F. 3d, at 46. The Court of Appeals stated that the registry and the disclaimer imply that each person listed is more likely than the average person to be currently dangerous. "That implication seems to us necessarily to flow from the State's choice of these particular individuals about whom to disseminate information, a record as to their sex offenses, and information as to their current whereabouts. This implication stigmatizes every person listed on the registry." *Id.*, at 49. In affirming the judgment of the District Court, the Court of Appeals stated that it was prohibiting the state from disseminating registry information without giving individuals an opportunity to prove that they are not currently dangerous. *Id.*, at 62. This Court granted certiorari.

SUMMARY OF ARGUMENT

Plaintiff's challenge to the Connecticut statute is really a substantive challenge "recast in 'procedural due process' terms." The statute provides that all persons convicted of certain offenses will be listed in a publicly available registry without any determination of present dangerousness. As a matter of substantive law, then, the statute renders present dangerousness legally irrelevant. As in *Reno* v. *Flores*, *Michael H.* v. *Gerald D.*, and *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, if the statute is substantively valid, there is no procedural due process issue.

To be substantively valid, the statute needs only a rational relation to a legitimate government interest. The difficulties in predicting the dangerousness of sex offenders are well known. The consequences of an erroneous prediction of nondangerousness are horrific. Given those realities, the Connecticut Legislature is well within its broad range of discretion to forego individualized predictions and base its registry on the simple fact of conviction.

ARGUMENT

I. If the statute is substantively valid, there is no procedural due process question.

Once again, a substantive challenge to a statute comes to the Court "recast in 'procedural due process' terms." *Reno* v. *Flores*, 507 U. S. 292, 308 (1993); see also *Michael H.* v. *Gerald D.*, 491 U. S. 110, 121 (1989) (plurality opinion); *New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 439 U. S. 96, 105 (1978) (statute, not board action, caused franchise delay). The principle by now should be clear. If a *valid* statute provides that undisputed fact X leads to legal consequence Y regardless of disputed fact Z, there *cannot* be a procedural due process right to a hearing on Z. A successful substantive attack

on the statute is a prerequisite to any claim of right to a hearing on a fact which the statute makes irrelevant.

Professors Rotunda and Nowak describe the distinction between procedural and substantive due process:

> "It is important to realize that procedural review is limited in scope. Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property. This aspect of the due process clauses does not protect against the use of arbitrary rules of law which are the basis of those proceedings. It is only necessary that a fair decision-making process be used; the ultimate rule to be enforced need not be a fair or just one.
>
> "For example, if a state legislature enacted a law which imposed the death penalty upon any person who had been found guilty of double parking an automobile after a determination of guilt through trial by jury and appellate review, the law would clearly comport with the *procedural* restrictions of the due process clauses. The law might violate the Eighth Amendment, as applied to the states by the Fourteenth Amendment, in that it constituted cruel and unusual punishment. Indeed the law might also violate the substantive guarantee of the due process clause of the Fourteenth Amendment insofar as it was an irrational and arbitrary abuse of the government's power to protect against traffic hazards. However, so long as the decision-making process by which the burden of the death penalty was handed out was a fair one, the law could not be stricken on the basis of 'procedural' due process." 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 14.6, p. 530 (3d ed. 1999) (emphasis in original).

More realistic, if less dramatic, examples can be found in the cases cited above. In *Reno* v. *Flores*, the INS had adopted a policy of keeping alien juveniles in custody pending deportation hearings when there was no parent or guardian available to

take custody. See 507 U. S., at 296. The Court analyzed the substantive validity of the policy first, rejecting the claim that a "best interests of the child" standard for custody was constitutionally required. *Id.*, at 304. From this substantive premise, the conclusion easily follows that there is no procedural due process right to a "best interests" hearing.

> "Respondents contend that this procedural system is unconstitutional because it does not require the Service to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other 'responsible adult.' This is the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Id.*, at 308.

Michael H. v. *Gerald D.*, involved a conclusive presumption that a child born to a married woman was the child of her husband, with no exceptions applicable to the case. See 491 U. S., at 113, 117-118. The plurality rejected Michael's claim of a procedural due process right to a hearing on biological paternity, because the statute was a rule of substantive law that rendered that fact irrelevant. See *id.*, at 119-120. The remainder of the opinion addresses the validity of the statute under substantive due process. See *id.*, at 121-132.

New Motor Vehicle Bd. involved a law that maintained the status quo of car dealer franchises, preventing the opening of a new franchise, pending an administrative hearing. See 439 U. S., at 103. "[T]he issue is whether . . . the right to franchise without delay is the sort of interest that may be suspended only on a case-by-case basis through prior individualized trial-type hearings." *Id.*, at 106. The Court rejected the claim, noting that it was the statute, not any action by the Board, "that curtailed General Motors' right to franchise at will." *Id.*, at 105. If the law requiring the delay regardless of individual circumstances was substantively valid, there could be no procedural due process right to a hearing on those circumstances. See *id.*, at

114 (Blackmun, J., concurring in the result); 2 Rotunda & Nowak, *supra*, at 533-534.

In the present case, the substantive law enacted by the Connecticut Legislature is that the persons convicted of the listed offenses will be listed in the registry. There is no provision for a hearing on present dangerousness, because the legislative policy choice was that case-by-case determinations would not be made, just as in *Flores*, *Michael H.*, and *New Motor Vehicle Bd.* In all four cases, the legislature or agency decided that the disadvantages of case-by-case determination of the fact claimed by the challenging party outweighed the advantages, and it decided to let the legal consequences be determined by a different fact. In *Flores* it was relationship versus "best interests." In *Michael H.* it was marriage versus biology. In *New Motor Vehicle Bd.* it was the existing dealer's protest rather than actual market conditions. In the present case, it is the prior conviction of a crime rather than a psychiatrist's opinion or other showing of present dangerousness.

In all four cases, the threshold question is the substantive validity of the legislature's or agency's decision to let consequence Y be determined by fact X rather than fact Z. If that decision is valid, there can be no right to a hearing on Z.

II. The statute is substantively valid.

The key question in this case is whether the Connecticut Legislature's decision to include all qualifying sex offenders in the registry without a case-by-case determination of present dangerousness constitutes "the exercise of power without any reasonable justification in the service of a legitimate governmental objective . . . ." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998). The answer is no.

A. The Rationality Standard.

The "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id.*, at 846.[2] Substantive due process review of statutes is a treacherous field. See *Albright* v. *Oliver*, 510 U. S. 266, 281 (1994) (Ginsburg, J., concurring). The most egregious violations of the people's right of democratic self-government have occurred here. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *County of Sacramento* v. *Lewis*, No. 96-1337, pp. 5-7 (available from http://www.cjlf.org/pdf/LewisT.pdf). As the Court explained in *Washington* v. *Glucksberg*, 521 U. S. 702, 720 (1997),

> "But we 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' *Collins* [v. *Harker Heights*], 503 U. S. [115], 125 [1992]. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' *ibid.*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, [citation]."

For this reason, exacting scrutiny is reserved for statutes impairing "fundamental rights found to be deeply rooted in our legal tradition." *Glucksberg*, 521 U. S., at 722. All other statutes need only "be rationally related to legitimate government interests." *Id.*, at 728. In reviewing a statute for rationality, the judicial branch need not and should not weigh the

2. This is another reason, in addition to the procedural/substantive distinction discussed in part I, *supra*, why the *Paul* v. *Davis*, 424 U. S. 693 (1976) line of cases is only tangentially related to this case.

relative strengths of the competing interests. See *id.*, at 735. That is the function of the legislative branch.

B. Identifying the Purported Right.

"As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *Lewis*, 523 U. S., at 841, n. 5. Plaintiff essentially claims a right to be excluded from the state's sex offender registry if he can establish on an individual basis that he is not presently dangerous. See Brief in Opposition 1. Given that the registry expressly disclaims any statement about present dangerousness and only claims to be a statement of the undisputed fact of the prior conviction, this is a most remarkable assertion. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it . . . ." *Reno* v. *Flores*, 507 U. S. 292, 303 (1993). Any claim that this purported right rises to the level of "fundamental," so as to require more than a rational basis, see *Glucksberg*, 521 U. S., at 722, would be frivolous.

At this point, we should note a possible objection to the Connecticut statute that is not at issue in the present case.

> "The statute does not itself give a name to the registry. The State refers to it, and referred to it on the Internet site, as the 'Sex Offender Registry,' although it includes persons convicted of several crimes 'against a victim who is a minor' that are not necessarily sexual in nature." *Doe*, 271 F. 3d, at 44, n. 13.

An action brought by persons convicted of nonsexual offenses who objected to the title of the registry would present different issues. They could claim a false representation and executive action beyond the mandate of the statute. Plaintiff John Doe does not allege that his offense was not a sex offense, or even tell us what it was. See App. to Brief in Opposition 3. The plaintiff class is all persons subject to the law, *id.*, at 5, and the District Court's injunction applies to the entire class. See *Doe*,

271 F. 3d, at 46. The present case thus deals with the statute in its principal application, to persons convicted of sex offenses, and not whether a limited subset of the class might be entitled to a more carefully tailored injunction, such as changing the name of the registry or separating the nonsexual offenders into a different registry. That is a case for another day, and apparently another representative plaintiff.

C. Application of the Standard.

There can be no doubt that protecting the public from sex offenders is a legitimate state interest. Indeed, it would easily qualify as a compelling interest, if that were required. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). The horrifying murder of Megan Kanka, see *State* v. *Timmendequas*, 161 N. J. 515, 537-544, 737 A. 2d 55, 66-70 (1999), by a twice-convicted sex offender, see *id.*, at 535, 737 A. 2d, at 65, galvanized the nation, and led to the enactment of the present statute, parallel statutes in all the other states, and an Act of Congress. See *State* v. *Timmendequas*, 168 N. J. 20, 28, 773 A. 2d 18, 22 (2001) (*Timmendequas II*); *Doe*, 271 F.3d, at 42.

The question of whether the means chosen is rationally related to this eminently legitimate interest nearly answers itself. Recidivism is a particular problem with sex offenders. Over 40% of prisoners convicted of rape or other sexual assaults are arrested for a new offense within three years of their release from prison. Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994, p. 8 (2002) (table 9). The nature of sexual offenses and sexual offenders makes reality even worse than this figure suggests. Sexual offenders are more likely to be rearrested for a similar charge than other types of offenders. See *id.*, at 10 (table 11). This danger is compounded by the fact that sex crimes are notoriously underreported. Although estimates of the fraction of sex crimes actually reported vary, all of them are low. See R. Holmes, Sex Crimes 75 (1991) (10% of rapes); Center for Sex Offender Management, Recidivism of Sex Offenders 3 (May 2001)

(available from http://www.csom.org/pubs/recidsexof.pdf) ("vastly underreported"; less than one in three sexual assaults on victims over 12 reported). Since the record on treatment is mixed at best, see, *e.g.*, Quinsey, Harris, Rice, & Lalumière, Assessing Treatment Efficacy in Outcome Studies of Sex Offenders, 8 J. Interpersonal Violence 512, 512-513 (1993); Recidivism of Sex Offenders, *supra*, at 13, safety is paramount.

Predictions of future dangerousness, particularly by mental health professionals, have long been controversial. *Barefoot* v. *Estelle*, 463 U. S. 880 (1983) addressed the constitutionality of the prosecution's use of psychiatric testimony to establish a capital defendant's future dangerousness. See *id.*, at 896. One contention was that psychiatrists were generally incompetent to make such predictions. See *ibid.* As the dissent noted, the American Psychiatric Association and numerous studies concluded that psychiatrists could not accurately predict future violent behavior. See *id.*, at 920-921 (Blackmun, J., dissenting). In spite of this, states could choose to allow this type of testimony to be admitted. Any doubts about the credibility of such predictions could be assessed by the jury. See *id.*, at 898-899 (majority). The general reliability of such assessments was similarly contested in *Kansas* v. *Hendricks*, 521 U. S. 346 (1997), which addressed the constitutionality of the civil commitment of violent sexual predators who have a "mental abnormality" that makes them likely to commit future violent sexual offenses. See *id.*, at 350. The ability of mental health professionals to diagnose the future dangerousness of sex offenders was again contested by the defense. See *id.*, at 355, n. 2. As in *Barefoot*, the state could make this finding a part of its procedure. See *id.*, at 357-358. The Court found that there was " 'nothing inherently unattainable about a prediction of future criminal conduct.' " *Id.*, at 358 (quoting *Schall* v. *Martin*, 467 U. S. 253, 278 (1984)). When combined with a finding of mental abnormality, the future dangerousness requirement appropriately narrowed the class of offenders eligible for civil commitment. See *ibid.*

The fact that such predictions have been deemed constitutionally *permissible* in conjunction with other factors in other contexts does not mean that Connecticut is constitutionally *mandated* to accept them as controlling in the present context. There is, or should be, a broad range of policy choices between what the Constitution forbids and what it requires. The question is only whether Connecticut's decision on the question is rational.

Notwithstanding *Barefoot* and *Hendricks*, there remains considerable basis for doubt about the reliability of predictions of dangerousness. "There is clear evidence in the sex offender treatment field that there is no specific profile of a sexual offender." Becker & Murphy, What We Know and Do Not Know About Assessing and Treating Sex Offenders, 4 Psychology, Pub. Pol. & L. 116, 123 (1998). Psychologists do not agree as to which method should be used in individual risk assessment. See Litwack, Actuarial Versus Clinical Assessments of Dangerousness, 7 Psychology, Pub. Pol & L. 409, 409 (2001). Some psychologists and researchers assert that actuarial (statistical) methods are better at predicting the future behavior of an individual, while other experts in the field argue for clinical evaluations. See *id.*, at 409-410.

Predicting the future behavior of a sex offender presents unique difficulties for psychologists because sex offenders are known to deny or minimize their past criminal history. Marshall, Current Status of North American Assessment and Treatment Programs for Sexual Offenders, 14 J. Interpersonal Violence 221, 222-223 (1999). Marshall states that offenders typically represent themselves in an exculpatory manner and that many outright deny they ever committed an offense. *Ibid.* Without accurate external information (police reports, victim statements, and possibly court records), mental health professionals easily reach inaccurate results. McGrath, Sex-Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings, 35 Int'l J. of Offender Therapy & Comp. Criminology 328, 331 (1991). Even with those

records, given the facts that only a small percentage of sexual offenses are reported and that offenders routinely lie, see *ibid.*, it seems evident that mental health professionals do not even have the necessary information to make predictions.

Becker and Murphy address the increasingly difficult questions that the legal system is asking mental health care professionals. See 4 Psychology, Pub. Pol. & L., at 116. They admit that the ability of mental health care professionals to answer these questions varies considerably. *Id.*, at 121. Psychological test data has not been highly predictive of recidivism of sex offenders. *Id.*, at 125. Some of the difficulty in this field is due to the problem of sex offender denial. *Id.*, at 123. Because sex offenders generally deny their past criminal activity, some clinicians are experimenting with the use of polygraph tests to evaluate dangerousness. *Ibid.* One such study "on a sample of imprisoned sex offenders with fewer than two known victims (on average), found that these offenders actually had an average of 110 victims . . . ." Recidivism of Sex Offenders, *supra*, at 3.

The most successful studies at predicting recidivism in individuals have only yielded accuracy results in the 40-45% range over random predictions. 4 Psychology, Pub. Pol. & L.,at 126. Prentky, Knight, and Lee, Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters, 65 J. Consulting & Clinical Psych. 141 (1997), studied recidivism of convicted child molesters. The method used in this study correctly identified 25 sex offenders who re-offended, and 58 who did not. *Id.*, at 146 (table 4). But the study misidentified 15 whom they predicted to re-offend, but who did not, and, most importantly for the present case, 15 whom they predicted not to re-offend, but who did. *Ibid.* And those are only the ones who were caught. See *id.*, at 144.

Center for Sex Offender Management, Recidivism of Sex Offenders, *supra*, provides a useful summary of the state of

research to date.[3] The article acknowledges that there are no absolutes or "magic bullets" in identifying factors that indicate an offender's risk to society. *Id.*, at 4. Rather, risk assessment

> "is an exercise in isolating factors that *tend* to be associated with specific behaviors. While this association reflects a likelihood, it does not indicate that all individuals who possess certain characteristics will behave in a certain manner. Some sex offenders will inevitably commit subsequent sex offenses, in spite our best efforts to identify risk factors and institute management and treatment processes aimed at minimizing these conditions." *Ibid.* (emphasis in original).

The area of sex offender risk assessment is a relatively new field in psychology that has yet to create an airtight method of determining which offenders will repeat their crimes. Psychology is a science with few absolutes. When a legislature " 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.' " *Jones* v. *United States*, 463 U. S. 354, 370 (1983) (quoting *Marshall* v. *United States*, 414 U. S. 417, 427 (1974)). In applying this proposition to the state's action in *Kansas* v. *Hendricks*, the Court stated that the fact that psychiatric professionals were not in complete harmony regarding the classification of pedophilia as a mental illness afforded the Kansas legislature the widest latitude in drafting the civil commitment statute. 521 U. S., at 360, n. 3. In applying this principle to the present case, Connecticut should be afforded the widest latitude in its choice *not* to undertake individual dangerousness assessments.

While it is true that there are no guarantees with any type of psychological assessment, the big difference with assessing sex offenders is that the price of failure is the victimization of

3. CSOM is a "collaborative effort of the Office of Justice Programs, the National Institute of Corrections, and the State Justice Institute . . . ." *Id.*, at 1.

an innocent person. Furthermore, convicted sex offenders subject to registration already possess the one factor universally associated with future sex offending—their prior sex offense conviction. See McGrath, Sex-Offender Risk Assessment, *supra*, 35 Int'l J. Offender Therapy & Comp. Criminology, at 336. It is beyond dispute that sex offenders in general "are much more likely to commit subsequent sexual offenses than the general criminal population," Recidivism of Sex Offenders, *supra*, at 15-16, not to mention the general law-abiding population. Connecticut's decision to warn the public of *all* convicted sex offenders *might* be considered irrational if an individual offender could show to a certainty that he is no more dangerous than the average person. However, given the current state of knowledge, the state is entitled to conclude that no such showing can be made.

The outrage that prompted Megan's Law was that a twice-convicted sex offender was living in the community, and that the fact of his convictions was not known to the public. *Timmendequas II*, 168 N. J., at 28, 773 A. 2d, at 22. If Megan's parents had known, they could have warned her to stay away from Timmendequas. If convicted sex offenders can be dropped from the registry upon a "showing" they are no longer dangerous, the Megan Kanka story will be repeated in those cases where the "showing" turns out to be wrong.

The Connecticut Legislature has decided that the risk of error in a prediction of nondangerousness exceeds the benefit of allowing exclusion on that basis. It is not the place of the Second Circuit, this Court, or any court to reweigh that risk-benefit assessment. See *Glucksberg*, 521 U. S., at 735. The choice is well within the bounds of rational relation to the undisputably legitimate goal, and that is sufficient to make the choice a legislative one, not a judicial one.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

July, 2002

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation